A

PETRODAR OPERATING CO LTD

v.

NAM FATT CORPORATION BHD & ANOR

B

COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
CLEMENT SKINNER JCA
AZIAH ALI JCA
[CIVIL APPEALS NO: W-02(IM)-2196-2010
C & W-02(IM)-2198-2010]
2 JULY 2012

CIVIL PROCEDURE: *Jurisdiction of court - High Court - Whether Malaysian High Court could hear dispute where defendant is a foreign* D *based company and parties agreed for Sudanese laws to apply - Whether dispute over fraudulent call on guarantee was made in Malaysia - Whether plaintiffs resident in Malaysia - Whether tort committed in Malaysia - Whether trial of action in Malaysia more convenient*

E The second respondent ('NF'), which was a subsidiary of the first respondent, entered through the vehicle of a joint venture company ('JV'), into a contract with the appellant, an offshore company, to carry out construction works on a project in Sudan. As required under the contract, NF provided a performance F guarantee ('the guarantee') in favour of the appellant, the owner of the project. The guarantee was issued by the Malaysian based CIMB Bank (L) Limited ('CIMB'). The parties agreed that the contract and the guarantee would be governed by the laws of Sudan. When disputes arose over the performance of the contract, the appellant attempted to make calls on the guarantee G despite the parties being in negotiation for settlement. Viewing the calls as fraudulent and unconscionable, the respondents obtained an *ex parte ad interim* injunction in Malaysia restraining the appellant from making a call on and receiving any proceeds under the guarantee pending the *inter partes* hearing. The respondents H obtained the leave of court to serve out of jurisdiction notice of a concurrent writ of summons as well as the injunction order and other related cause papers to the appellant. On the other hand, the appellant applied, unsuccessfully, to set aside the concurrent writ of summons and the leave order for service of same. It also I failed to set aside the *ad interim* injunction. The appellant argued, *inter alia*, that, (i) the High Court did not have jurisdiction over the subject matter of the respondents' claim; (ii) the appellant was

not resident within nor had a place of business in Malaysia and did not submit to the court's jurisdiction; and (iii) even if the court had jurisdiction, Malaysia was not the proper forum to adjudicate the dispute. The High Court held it had jurisdiction to hear the case and that in the interests of the parties and of justice, the action should be tried in Malaysia. It held that the Malaysian court could statutorily assume jurisdiction over the foreign defendant (the appellant) under O. 11 r. 1 of the Rules of the High Court 1980 ('RHC'). The Court also held that in view of the serious questions that existed for trial, the *ad interim* injunction should remain in force until the *inter partes* hearing. Dissatisfied with the said decision, the appellant appealed to the Court of Appeal against the decision.

Held (dismissing appeals with costs)
Per Aziah Ali JCA delivering the judgment of the court:

(1) The High Court was correct in holding that it had jurisdiction to hear the respondents' claim. The first respondent was a public listed company in Malaysia and NF was its subsidiary. The guarantee was issued on the respondents' request by CIMB which had a place of business in Kuala Lumpur. The alleged fraudulent and/or unconscionable demand on the guarantee was made in Malaysia and the respondents' claim premised on a fraudulent demand was a tort that was committed in Malaysia. (para 19)

(2) In the context of O. 11 r. 1 RHC, 'jurisdiction' referred to jurisdiction over the foreign defendant and not jurisdiction over the claim. Thus, where the court after having decided it had jurisdiction over the subject matter found the foreign defendant could not be served in Malaysia because he was not present here and had not submitted to its jurisdiction (like the appellant), in such circumstances the court was allowed to statutorily assume jurisdiction over the foreign defendant under O. 11 r. 1 RHC if it was satisfied that any of the limbs under that provision applied. Viewed in that context, the High Court was not wrong in stating the Malaysian court could have jurisdiction statutorily over a foreign defendant under O. 11 r. 1 of the RHC as jurisdiction was implicit in the power to grant leave for service out of jurisdiction. (para 23)

(3) The facts showed that although the instructions to make the demand on the guarantee originated from the appellant, the purported fraudulent and/or unconscionable demand was made in Malaysia at CIMB's office in Malaysia. Both the respondents were in Malaysia. Accordingly, the evidence from witnesses on the issues of fact would be more readily available in Malaysia thereby making a trial in Malaysia more convenient. (para 30)

(4) The High Court did not err in exercising its discretion not to set aside the *ad interim* injunction pending the *inter partes* hearing. The facts before the court at the *ex parte* stage were that the appellant had made calls on the guarantee despite parties being in negotiations for settlement and despite the fact that the JV had acceded to the appellant's request by asking for the guarantee to be renewed pending settlement negotiations. The respondents had averred that the demand was made as a tool or means of oppression or vexation against them and that, in the circumstances, the demand was fraudulent, unconscionable and/or invalid under the law. (para 35)

Bahasa Malaysia *Translation Of Headnotes*

Responden kedua ('NF'), yang merupakan anak syarikat kepada responden pertama, telah memasuki melalui syarikat usahasama ('JV'), ke dalam suatu kontrak dengan perayu, sebuah syarikat luar pesisir untuk menjalankan kerja-kerja pembinaan atas projek di Sudan. Seperti diperuntukkan di bawah kontrak, NF telah menyediakan satu gerenti prestasi ('gerenti') berpihak kepada perayu, iaitu pemilik projek. Gerenti itu dikeluarkan oleh Bank CIMB (L) Limited berpengkalan di Malaysia ('CIMB'). Pihak-pihak bersetuju bahawa kontrak dan gerenti akan ditakluk oleh undang-undang Sudan. Apabila bangkitnya pertikaian terhadap prestasi kontrak, perayu cuba memanggil atas gerenti walaupun pihak-pihak berunding untuk penyelesaian. Memandangkan panggilan tersebut bersifat frod dan tidak berhati perut, responden telah memperolehi injunksi *ex parte ad interim* di Malaysia untuk menghalang perayu daripada membuat panggilan terhadap dan menerima sebarang hasil daripada gerenti sementara menunggu pendengaran *inter partes*. Responden-responden juga memperolehi kebenaran mahkamah untuk menyampaikan notis di luar bidangkuasa kepada perayu

berkenaan writ saman serentak bersama-sama dengan perintah injunksi dan kertas kausa yang berkaitan. Sebaliknya, perayu telah memohon, tetapi tidak berjaya, untuk mengenepikan writ saman serentak itu dan kebenaran penyampaian writ tersebut. Ia juga gagal mengenepikan injunksi *ad interim*. Perayu berhujah, antara lain, bahawa, (i) Mahkamah Tinggi tidak mempunyai bidangkuasa berkenaan subjek perkara tuntutan pihak responden; (ii) perayu bukanlah pemastautin di dalam atau mempunyai alamat perniagaan di Malaysia dan tidak mengemukakan kepada bidangkuasa mahkamah; dan (iii) walaupun mahkamah mempunyai bidangkuasa, Malaysia bukanlah forum yang betul untuk mengendalikan pertikaian ini. Mahkamah Tinggi memutuskan bahawa ianya mempunyai bidangkuasa untuk mendengar kes ini dan bagi kepentingan pihak-pihak dan demi keadilan, tindakan sepatutnya dibicarakan di Malaysia. Ianya diputuskan bahawa mahkamah di Malaysia boleh menganggap bidangkuasa secara statutori terhadap defendan warga asing (perayu) di bawah A. 11 k. 1 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Mahkamah juga memutuskan bahawa memandangkan persoalan serius yang wujud bagi perbicaraan, injunksi *ad interim* sepatutnya kekal berkuatkuasa sehingga pendengaran *inter partes*. Tidak puas hati dengan keputusan itu, perayu merayu ke Mahkamah Rayuan terhadap keputusan tersebut.

Diputuskan (menolak rayuan dengan kos)
Oleh Aziah Ali HMR menyampaikan penghakiman mahkamah:

(1) Mahkamah Tinggi betul dalam memutuskan ianya mempunyai bidangkuasa untuk mendengar tuntutan pihak responden. Responden pertama merupakan sebuah syarikat awam tersenarai di Malaysia dan NF merupakan anak syarikatnya. Gerenti dikeluarkan atas permintaan pihak responden oleh CIMB yang mempunyai alamat perniagaan di Kuala Lumpur. Alegasi frod dan/atau tidak berhati perut terhadap gerenti telah dibuat di Malaysia dan tuntutan pihak responden berlandaskan tuntutan frod merupakan tort yang dilakukan di Malaysia.

(2) Di dalam konteks A. 11 k. 1 KMT, 'bidangkuasa' merujuk kepada bidangkuasa terhadap defendan warga asing dan bukannya bidangkuasa terhadap tuntutan. Oleh itu, di mana mahkamah, setelah memutuskan bahawa ianya mempunyai bidangkuasa terhadap subjek perkara mendapati defendan warga asing tidak boleh diserahkan di Malaysia kerana beliau

tidak hadir di sini dan tidak menerima bidangkuasa tersebut (seperti perayu), dalam keadaan sebegitu, mahkamah dibenarkan untuk menganggap secara statutori bidangkuasa terhadap defendan warga asing di bawah A. 11 k. 1 KMT jika ia berpuas hati bahawa mana-mana cabang di bawah peruntukan terpakai. Memandang dalam konteks tersebut, Mahkamah Tinggi tidak salah dalam menyatakan bahawa mahkamah di Malaysia boleh mempunyai bidangkuasa statutori terhadap defendan asing di bawah A. 11 k. 1 KMT memandangkan bidangkuasa adalah tersirat dalam kuasa untuk membenarkan kebenaran penyampaian di luar bidangkuasa.

(3) Fakta menunjukkan bahawa walaupun arahan untuk membuat tuntutan terhadap gerenti berpunca daripada perayu, frod dan/atau tuntutan tidak berhati perut telah dibuat di Malaysia di pejabat CIMB di Malaysia. Kedua-dua responden adalah daripada Malaysia. Dengan itu, keterangan saksi-saksi terhadap isu berfakta adalah sedia ada di Malaysia membuatkan suatu perbicaraan di Malaysia lebih mudah.

(4) Mahkamah Tinggi tidak khilaf dalam melaksanakan budibicaranya untuk tidak mengenepikan injunksi *ad interim* sementara menunggu pendengaran *inter partes*. Fakta di hadapan mahkamah semasa peringkat *ex parte* adalah bahawa perayu telah membuat panggilan terhadap gerenti walaupun pihak-pihak dalam rundingan untuk penyelesaian dan walaupun fakta JV telah menuruti permintaan perayu dengan menanyakan supaya gerenti dibaharui sehingga menunggu rundingan penyelesaian. Responden-responden menegaskan bahawa tuntutan telah dibuat sebagai alat atau satu cara penindasan atau menyusahkan terhadap mereka dan bahawa, dalam keadaan ini, tuntutan adalah bersifat frod, tidak berhati perut dan/atau tidak sah di bawah undang-undang.

Case(s) referred to:

American Express Bank Ltd v. Mohamad Toufic Al-Ozeir & Anor [1995] 1 CLJ 273 SC ***(refd)***

Bocoltra Construction Pte Ltd & Ors v. Attorney General (No 2) [1995] 2 SLR 733 ***(refd)***

Focal Asia Sdn Bhd & Anor v. Raja Noraini Raja Datuk Nong Chik & Anor [2009] 1 LNS 913 HC ***(refd)***

Globus Shipping & Trading Co (Pte) Ltd v. Taiping Textiles Berhad [1976] 1 LNS 31 FC ***(refd)***

Harrah's Operating Company Inc v. Wu Yun Shya Josephine [2008] 5 CLJ 251 CA ***(refd)***
Kejuruteraan Bintai Kindenko Sdn Bhd v. Nam Fatt Construction Sdn Bhd & Anor [2011] 7 CLJ 442 CA ***(refd)***
RIH Services (M) Sdn Bhd v. Tanjung Tuan Hotel Sdn Bhd [2002] 3 CLJ 83 CA ***(refd)***
Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 SC ***(refd)***
Sumatec Engineering And Construction Sdn Bhd v. Malaysian Refining Company Sdn Bhd [2012] 3 CLJ 401 FC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 176
Courts of Judicature Act 1964, s. 23
Rules of the High Court 1980, O. 11 r. 1(h), (i), (j), O. 29

For the appellant - K Nayagam (Janice Tay with him); M/s Skrine
For the respondents - Tee Geok Hock; M/s GH Tee & Co

[Appeal from High Court, Kuala Lumpur; Suit No: S-22-315-2010]

Reported by Ashok Kumar

JUDGMENT

Aziah Ali JCA:

[1] We heard two appeals filed by the appellant (1st defendant in the court below). Civil Appeal No. W-02(IM)-2198-2010 was the appellant's appeal against the decision of the learned Judicial Commissioner dismissing the appellant's application to set aside the concurrent writ of summons, notice of writ to be served out of the jurisdiction and the order dated 15 April 2010 giving leave to the respondents (plaintiffs' in the court below) to serve the notice of the concurrent writ and the service of the concurrent writ (encl. 35). Civil Appeal No.W-02(IM)-2196-2010 was the appeal against the decision of the learned Judicial Commissioner dismissing the appellant's application to set aside, or alternatively discontinue, the *ad interim* injunction granted on 3 May 2010 (encl. 43).

[2] We had considered the submissions made and perused the appeal records and by a unanimous decision we dismissed both appeals with costs of RM30,000 to the respondents for both appeals and the deposit to the respondents towards costs.

Background

[3] The background facts have been laid out succinctly in the grounds of judgment of the learned Judicial Commissioner. For the purpose of these appeals we reproduce the salient facts. The 1st respondent is a public listed company listed with Bursa Malaysia. The 2nd respondent is a subsidiary of the 1st respondent. The appellant is an off-shore company incorporated in British Virgin Islands and having its registered office in Khartoum, Sudan. The 2nd defendant in the court below is an off-shore bank in Labuan. The 2nd defendant was not a party in these appeals.

[4] The 2nd respondent through the vehicle of Bentini-NF Energy JV, a joint venture company with one Italian company Bentini S.p.A. ("the JV"), had entered into a contract with the appellant for the construction of part of the works in a project in Sudan known as 'Engineering, Procurement, Construction and Commissioning of Pumping Facilities' ("the project") in the Melut Basin Oil Development Project at the contract price of USD180 million ("the contract"). The appellant was the owner of the project. The contract provides that it shall be governed by and construed in accordance with the laws of the Republic of Sudan.

[5] The 2nd respondent had issued a performance guarantee ("guarantee") for USD18 million in favour of the appellant. As collateral for the issuance of the said guarantee, the 1st respondent had at the request of the 2nd respondent, provided to the 2nd defendant securities in the form of fixed deposit of RM20 million and a piece of land. The guarantee was issued by the 2nd defendant in Kuala Lumpur.

[6] Disputes arose between the JV and the appellant regarding claims for variation works done and changes to the JV's original works which the respondents claim the appellant had refused to certify or pay. It was also alleged that the appellant had committed many acts of interference in the JV's execution of the works. The respondents have instructed solicitors to prepare and refer the disputes to arbitration as provided for under condition 55.2 of the contract.

[7] According to the respondents in May 2007 the JV was informed by its site staff that the appellant's representative had threatened to make a call on the guarantee which the JV alleged was an abuse of the guarantee and made in bad faith. It was

alleged that despite the respondents' agreement to renew the guarantee, on 26 February 2009 the appellant had sent its staff to the 2nd defendant bank in Kuala Lumpur with threats of making demand on the guarantee. The respondents aver that this showed that the appellant had intention to abuse the guarantee and to make fraudulent and/or unconscionable demand on the guarantee. On 25 August 2009 the appellant again sent its staff to the 2nd defendant's Kuala Lumpur office with threat of making demand on the 2nd guarantee. On or about 1 December 2009 the JV wrote to the 2nd defendant to inform the 2nd defendant that any claim or demand under the guarantee made by the appellant would be fraudulent, unconscionable and/or invalid and that the 2nd defendant should not accede to it.

[8] Towards the end of 2009 the appellant had invited the JV to negotiate for settlement and pursuant to this, by letter dated 3 February 2010 the JV requested the 2nd defendant to extend the guarantee pending negotiation for amicable settlement. On 18 March 2010 the respondents obtained an *ad interim* restraining order pursuant to s. 176 of the Companies Act 1965 from the Shah Alam High Court which restrains the appellant by themselves or by their servants agents from taking any action to enforce the guarantee or from taking any proceedings whatsoever or from appointing receivers or managers under the security except with leave of court. According to the respondents despite the fact that the JV had acceded to the appellant's request by asking for the guarantee to be renewed pending settlement negotiations, unknown to them, on 8 April 2010 the appellant had sent its staff to the 2nd defendant bank purportedly to demand extension of the guarantee. The appellant had also faxed a letter dated 8 April 2010 to the JV stating amongst others that the purported demand was to get the 2nd defendant to issue a replacement performance guarantee for another six months. By letter dated 8 April 2010 the JV notified the 2nd defendant that the appellant's purported demand dated 8 April 2010 is fraudulent, unconscionable and/or invalid and the 2nd defendant should not accede to it and any payment the 2nd defendant would make after having been notified of the appellant's fraud in the demand would render such payment fraudulent and/or breach of contract or duty.

[9] The respondents claimed that the purported call on the guarantee or making or intending to make a call on the guarantee was fraudulent and/or unconscionable under the laws of Malaysia as well as under the laws of Sudan. According to the respondents

a claim or payment made under the guarantee would cause the respondents to suffer irreparable damage which cannot be compensated by monetary compensation because their commercial reputation as contractor in the building industry would be damaged and the banks would withdraw or freeze the loans and facilities given to the respondents. This would result in the respondents being unable to proceed with the other projects it had undertaken.

[10] By way of the amended statement of claim, the respondents prayed for amongst others an injunction to restrain the appellant from calling or demanding on the guarantee and/or from receiving any proceeds of monies under the guarantee. On 13 April 2010 the respondents obtained an *ex parte* injunction to restrain the appellant from receiving the money under the guarantee. The date for the *inter partes* hearing was fixed for 3 May 2010. However parties were absent for the *inter partes* hearing and the learned Judicial Commissioner re-scheduled the hearing to 3 June 2010 and made an *ad interim* injunction order to preserve the status quo until disposal of the *inter partes* hearing. On 3 June 2010 again parties were absent and the court rescheduled the *inter partes* hearing to 16 June 2010.

[11] On 15 April 2010 the respondents obtained leave to issue notice of concurrent writ for service, service of the *ex parte* injunction order and related cause papers on the appellant out of jurisdiction. On 7 June 2010 the appellant filed conditional appearance. On 16 June 2010 the appellant filed the application to set aside the service of the writ and for a stay of proceedings pending reference to arbitration (encl. 35). The learned Judicial Commissioner dismissed the application to set aside but allowed the stay. The appellant subsequently filed the application to set aside the *ad interim* injunction (encl. 43). This was also dismissed by the learned Judicial Commissioner. Hence these two appeals before us. At the hearing of the appeals we were informed by learned counsel for the respondents that pursuant to the *inter partes* hearing the *ad interim* injunction had been set aside.

Civil Appeal No. W-02(IM)-2198-2010 (encl. 35)

[12] The appellant relied on s. 23 of the Courts of Judicature Act 1964 ("the CJA") in support of its application to set aside the concurrent writ of summons, notice of writ to be served out of

the jurisdiction and the order dated 15 April 2010 giving leave to serve the notice of the concurrent writ and the service of the concurrent writ. Section 23 provides as follows:

> (1) Subject to the limitations contained in art. 128 of the constitution the High Court shall have jurisdiction to try all civil proceedings where:
>
> (a) the cause of action arose;
>
> (b) the defendant or one of several defendants resides or has his place of business;
>
> (c) the facts on which the proceedings are based exist or are alleged to have occurred; or
>
> (d) any land the ownership of which is disputed is situated,
>
> within the local jurisdiction of the court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.
>
> (2) Without prejudice to the generality of subsection (1), the High Court shall have such jurisdiction as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction.

[13] The grounds upon which the appellant relied on are as follows:

(a) the court lacks jurisdiction over the subject matter of the respondents' claim;

(b) the appellant is not resident within Malaysia nor does it have its place of business within Malaysia, and does not submit to the court's jurisdiction, and

(c) the 2nd defendant bank ought never to have been joined as a party as there is no cause of action against it.

Alternatively it was submitted that in the event the court decides it had jurisdiction, this action ought still to be set aside as Malaysia is not a proper forum and proceedings in Malaysia would give rise to multiplicity of proceedings.

[14] Before the learned Judicial Commissioner, it was submitted for the appellant that the contract was performed in Sudan and subject to Sudanese law (condition 56.1 of the contract). With regard to the dispute on the performance guarantee it was submitted that parties had agreed that it shall be governed by and construed according to the laws of Sudan and the surety agreed to submit to the non-exclusive jurisdiction of the courts in Sudan (item no. 8 of the 'Form of Contractor's Performance Guarantee'). The respondents on the other hand contended that the appellant had submitted to the jurisdiction of the Malaysian court by filing affidavits and by making various applications and by accepting from the respondents the quarterly interest payments as ordered by the learned Judicial Commissioner as a condition for the granting of the stay order. These payments are retained by the appellant's solicitors.

Jurisdiction

[15] The learned Judicial Commissioner decided that the Malaysian court had jurisdiction in this case. In making his decision that the Malaysian court has jurisdiction, we find that the learned Judicial Commissioner had referred to the following facts pleaded by the respondents in the statement of claim:

(a) the subject matter of this suit is a performance guarantee issued by the 2nd defendant in Kuala Lumpur;

(b) the 2nd defendant is a Malaysian company having its place of business in Kuala Lumpur;

(c) it was the 1st plaintiff, at the request of the 2nd plaintiff, who caused the 2nd defendant to issue the performance guarantee;

(d) the 1st defendant made a purported demand on the performance bond in Kuala Lumpur;

(e) it is the plaintiffs' case that the 1st defendant's purported demand was fraudulent or unconscionable;

(f) it is also the plaintiffs' case that the 1st defendant, by making the purported demand in calling upon the bond, committed a tort of fraud in the circumstances, and that the 2nd defendant owed a duty of care towards the plaintiffs to ensure that any call made by the 1st defendant on the guarantee was not made fraudulently and/or unconscionably;

(g) on or about 1 December 2009 the JV brought the fraud or unconscionability to the notice of the 2nd defendant; A

(h) the 2nd defendant also had direct knowledge of the two previous incidents where the 1st defendant made purported demands on the previous guarantee for the ulterior motive or oppressive purpose of exerting pressure upon the 2nd defendant to immediately renew the guarantee; B

(i) the Shah Alam High Court restraining order dated 8 March 2010 was also brought to the attention of the 2nd defendant but the 2nd defendant did not appear to be bothered about the restraining order. This restraining order had been extended to 9 July 2010; C

(j) it is the plaintiffs' case that in the circumstances of this case, a demand or claim of the 1st defendant towards the guarantee would be fraudulent, unconscionable and/or invalid under the law; D

(k) it is also the plaintiffs' case that the 1st defendant's demand or call on the guarantee is fraudulent, unconscionable and/or invalid in the circumstances of the project, and/or the demand was made as a tool or means of oppression or vexation against the respondents. Moreover the 2nd defendant's act of paying under the circumstances would render it privy to the fraud and/or would be tainted by fraud and/or unconscionability. E F

[16] The learned Judicial Commissioner had also considered the reliefs claimed by the respondents in the amended statement of claim which amongst others are as follows:

(a) a declaration that on the facts and circumstances of or pertaining to the project, the purported call or demand dated 8 April 2010 which was made by the 1st defendant on the guarantee is fraudulent and/or unconscionable, and is therefore null and void; G

(b) a declaration that on the facts and circumstances of the case, the 1st defendant's purported demand on the guarantee was prohibited by the *ad interim* order dated 13 March 2010 and/or was in contempt of court or in contravention of the court order; H I

(c) an injunction to restrain the 1st defendant from calling or demanding on the guarantee and/or further to restrain the 1st defendant from receiving any proceeds of monies under the guarantee pursuant to the purported call or demand dated the 8 April 2010;

(d) a declaration that the 2nd defendant, having been informed of the relevant facts and circumstances of the project which relates to the fraud or intended fraudulent demand on the part of the 1st defendant, would be a party or privy to the fraud if the 2nd defendant were to make payment pursuant to the 1st defendant's demand;

(e) a declaration that the 2nd defendant, having been notified of the relevant facts and circumstances of the project which relate to the fraud or intended fraudulent demand on the part of the 1st defendant, would be acting unlawfully or improperly or *mala fide* if the 2nd defendant were to make payment pursuant to the 1st defendant's demand and that in such event the 2nd defendant would not be entitled to recover the payment or any part thereof from the plaintiffs;

(f) a declaration that the 2nd defendant, having been informed of the *ad interim* order dated 18 March 2010, would be acting in contempt of court or in contravention of the said court order if the 2nd defendant were to proceed to make payment pursuant to the 1st defendant's demand and that in such event the 2nd defendant would not be entitled to recover the payment or any part thereof from the plaintiffs.

[17] We are unable to agree with counsel for the respondents that the appellant had by conduct submitted to the court's jurisdiction. We agree with the learned Judicial Commissioner who had decided that, on the authority of *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716, the appellant had not submitted, succumbed nor surrendered to the jurisdiction of the court merely because they had objected to the *ad interim* injunction.

[18] In the case of *American Express Bank Ltd v. Mohamad Toufic Al-Ozeir & Anor* [1995] 1 CLJ 273, cited by the learned Judicial Commissioner, the appellant/defendant was a foreign bank carrying on business in Singapore. The respondents/plaintiffs who were residents in Malaysia were customers of the foreign bank in

connection with foreign exchange dealings or transactions. The respondents/plaintiffs filed a suit alleging that the foreign bank had acted in "fraudulent breach of a fiduciary duty". The learned Deputy Registrar granted leave to issue and to serve the said notice of writ of summons out of jurisdiction on the foreign bank. The foreign bank filed a conditional appearance and a further application for the order of the learned deputy registrar to be set aside and for a further order that the said notice of writ of summons itself and the service of the same to be also set aside with costs. For the foreign bank it was argued firstly, that the subject matter of claim was in contract. Secondly, all the foreign exchange transactions and other things took place outside Malaysia, except for the instructions and information from the foreign bank to the bank customers, which were received by the bank customers in Kuala Lumpur and acted on by them in Kuala Lumpur. Thirdly both agreements had provided for all disputes between the parties to be adjudicated in Singapore. Thus the two issues before the High Court was (a) whether the Malaysian High Court had jurisdiction to hear the action filed, and (b) whether the Malaysian High Court was or was not a *forum non conveniens*. The High Court judge decided amongst others that the tort of fraudulent and negligent misrepresentation when made by the telephone or telex was committed at the place where the message was received and acted on, and not the place from which it was sent. His Lordship held that the High Court had jurisdiction in this matter to entertain the claim. The Supreme Court agreed with the view of the learned judge. Peh Swee Chin SCJ in his judgment said *inter alia*:

> In a case like the present one, involving some foreign elements, the question that normally first of all arises, is whether our courts have jurisdiction ie, power to deal with the case.

[19] In the present case it was not disputed that the 1st respondent is a public-listed company in Malaysia and the 2nd respondent is its subsidiary. The guarantee was issued by the 2nd defendant upon the request made by the 2nd respondent to the 1st respondent. The 2nd defendant has a place of business in Kuala Lumpur. The alleged fraudulent and/or unconscionable demand to the 2nd defendant was made in Malaysia which required the 2nd defendant to make payment through Malaysian bank by telegraphic transfer. Based on the authority of *American Express Bank Ltd (supra)* wherein the Supreme Court stated that the claim of fraudulent misrepresentation is a tort, the learned

Judicial Commissioner found that the respondents' claim was premised on a fraudulent demand and "was cast in tort" and it was committed in Malaysia. On the facts we agree with the learned Judicial Commissioner that the High Court has jurisdiction to hear the respondents' claim.

Order 11 r. 1 RHC

[20] The respondents had relied on O. 11 r. 1(h), (i) and (j) RHC which provide as follows:

> **Order 11. Service of Process, Etc., Out of the Jurisdiction**
>
> 1. Principal cases in which service of notice of writ out of jurisdiction is permissible. (O. 11 r. 1)
>
> (1) Where the writ does not contain any claim for damage, loss of life or personal injury arising out of:
>
> (i) a collision between ships; or
>
> (ii) the carrying out of or omission to carry out a manoeuvre in the case of one or more of two or more ships; or
>
> (iii) non-compliance on the part of one or more of two or more ships, with the collision regulations made under s. 251 of the Merchant Shipping Ordinance 1952 [70/52],
>
> service of a notice of a writ out of the jurisdiction is permissible with the leave of the court in the following cases, that is to say:
>
> (h) if the action begun by the writ is founded on a tort committed within the jurisdiction;
>
> (i) if in the action begun by the writ an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of a failure to do or the doing of that thing);
>
> (j) if the action begun by the writ being properly brought against a person duly served within the jurisdiction, a person out of the jurisdiction is a necessary or proper party thereto;

[21] The learned Judicial Commissioner found that all the provisions of O. 11 r. 1 relied on by the respondents applied to this case. His Lordship stated that he agreed with the principle expressed in the case of *American Express Bank (supra)* that where the defendant is not present in Malaysia and had not submitted to jurisdiction, the Malaysian court can have jurisdiction statutorily

over a foreign defendant under O. 11 r. 1 of the RHC as jurisdiction is implicit in the power to grant leave for service out of jurisdiction (p. 46 of appeal record). Learned counsel for the appellant submitted that the learned Judicial Commissioner erred in finding that the High Court was seised of jurisdiction based on O. 11 of the RHC. It is submitted that the substantive law that confers jurisdiction is s. 23 of the CJA.

[22] For purpose of clarity, we reproduce the relevant part of the judgment of Peh Swee Chin SCJ which the learned Judicial Commissioner had referred to as follows:

> If neither such a defendant can be served in this country, because he is not present here nor has he submitted to jurisdiction, then the Malaysian courts can **assume statutorily**, such **jurisdiction over the foreign defendant** under O. 11 r. 1 of the Rules of the High Court 1980, (hereinafter called RHC) on the foreign defendant, as the **conferment of such jurisdiction is implicit in connection with the granting of leave** by the High Court for service out of jurisdiction etc. There is no need to go further in this case by referring to the relevant provisions of the courts of Judicature Act 1964 etc for source or origin of such **statutory jurisdiction**. (emphasis added)

[23] From the above judgment it is apparent that in the context of O. 11 r. 1 RHC, 'jurisdiction' refers to 'jurisdiction over the foreign defendant' and not jurisdiction over the claim, as learned counsel for the appellant suggested. Thus where the court, after having decided that it has jurisdiction over the subject matter but finds that the foreign defendant cannot be served in Malaysia because he is not present here and has not submitted to jurisdiction (like the appellant herein), in such circumstances the court is allowed to statutorily assume jurisdiction over the foreign defendant under O. 11 r. 1 RHC if the court is satisfied that any of the limbs under O. 11 r. 1 apply. As the jurisdiction is statutory, it is for this reason that Peh Swee Chin SCJ said:

> "There is no need to go further in this case by referring to the relevant provisions of the Courts of Judicature Act 1964 etc for source or origin of such statutory jurisdiction". Thus viewed in the context of O. 11 r. 1 we are of the view that the learned Judicial Commissioner had not erred when His Lordship stated that "the Malaysian court can have jurisdiction statutorily over a foreign defendant under O. 11 r. 1 of the RHC as jurisdiction is implicit in the power to grant leave for service out of jurisdiction".

[24] It was submitted for the appellant that parties to the contract had agreed that the contract was subject to Sudanese law and the guarantee would be governed by and construed according to the laws of Sudan and that the surety had agreed to submit to the non-exclusive jurisdiction of the courts in Sudan (item no. 8 of the guarantee).

[25] In *Globus Shipping & Trading Co (Pte) Ltd v. Taiping Textiles Berhad* [1976] 1 LNS 31, that was cited by the learned Judicial Commissioner, the plaintiff had its place of business in Kuala Lumpur. They had forwarding agents to act for them in Penang. The defendants were carriers for reward and had its principal place of business in Singapore but they had agents in Penang. The plaintiff's claim was for damages for breach of contract by the defendants as carriers of a cargo of cotton from Karachi to Penang. Counsel for the defendants took a preliminary objection that by reason of cl. 3 of the bill of lading the court had no jurisdiction to hear the case. Clause 3 provided as follows:

> Any dispute arising under the bill of lading shall be decided in the country where the carrier has his principal place of business and the law of such country shall apply.

Counsel for the plaintiff on the other hand submitted that the court had jurisdiction to determine the claim on the ground that although the plaintiff was in Kuala Lumpur they had forwarding agents in Penang. The learned judge of the High Court was of the opinion that it was a proper case where the discretion should be exercised in favour of the plaintiff. The decision of the High Court was upheld by the Federal Court. In its judgment the Federal Court concluded as follows:

> It would seem abundantly clear from the authorities that where a cause of action in respect of any dispute in relation to a contract arises and is therefore properly within its jurisdiction, the court has a discretion whether or not to adjudicate upon the claim in the action even where the parties have agreed to refer such dispute to a foreign court, and that the question of jurisdiction is quite separate from the question of the proper law of the contract to be applied.

[26] In *American Express Bank (supra)*, under the foreign jurisdiction clauses in the agreements the bank customers had submitted to the jurisdiction of the Singapore Courts, and both parties had chosen Singapore law as the law of their choice for the litigation. Peh Swee Chin SCJ said:

> It would be clear that, notwithstanding such clauses, a Malaysian Court ie, High Court below, could not be precluded simpliciter thereby from exercising the discretion, according to the doctrine of *forum non conveniens*, as to whether to hear the instant case or not, ...

Peh Swee Chin SCJ had also said *inter alia*:

> To continue with our view, it is most important to bear in mind another vital principle, that even if there is such jurisdiction to deal with the case, at common law, a Malaysian Court has still the discretion to decide whether to deal with it on the doctrine of *forum non conveniens*. If the court exercises its discretion accordingly eg, not to deal with the case, then as the case may be, it can either stay the proceedings against the foreign defendant or refuse to grant leave to issue and serve out of jurisdiction such a notice of writ of summons, or permit an application to set aside such leave when leave has already been granted in the absence of the foreign defendant in an ex parte application for such leave earlier.
>
> ... we are of the considered view that in all cases of either a defendant's application for stay of proceedings or a plaintiff's application for leave to serve out of jurisdiction under O. 11 r. 1 of RHC, or for setting aside such leave, it will be obligatory for a Malaysian Court to consider in any event, a most important factor ie, whether "it would be unjust to the plaintiff to confine him to remedies elsewhere". It is indispensable when a Malaysian Court considers all cases in connection with *forum non conveniens*.
>
> The most important factor described above does arise, of course, out of a great variety of factors that a Malaysian Court ought to consider in applying the said doctrine; the prominent one being that whether any particular forum is one with which the action has the most real and substantial connection.

[27] The appellant herein, like the defendant foreign bank in *American Express Bank*, had applied to set aside the leave granted *ex parte* earlier to the respondents to issue and serve the writ of summons out of jurisdiction. Therefore the High Court had the discretion to decide whether to hear the case. In making its decision the High Court is obliged to consider, based on the doctrine of *forum non conveniens*, whether it would be unjust to confine the respondents to remedies elsewhere.

A ***Forum Non Conveniens***

[28] In *Harrah's Operating Company Inc v. Wu Yun Shya Josephine* [2008] 5 CLJ 251, Suriyadi Halim Omar JCA (as His Lordship then was) said:

B

> This doctrine of *forum non conveniens* in a gist refers to the discretionary power of court to decline jurisdiction when convenience of parties and ends of justice would be better served if action were brought and tried elsewhere. The phrase does not mean that the court before which the issue is being canvassed is
> C not convenient but that some other court is more suitable (Black's Law Dictionary). *Spiliada Maritime Corporation v. Cansulex. Ltd* [1987] AC 460 had accepted this doctrine which originated from Scotland when Lord Goff said:
>
> ... there is some other tribunal, having competent jurisdiction in
> D which the case may be tried more suitably for the interests of all the parties and for the ends of justice.

[29] The respondents herein contended that the Malaysian court is the suitable or appropriate forum to try this action and that it
E would be unjust to compel the respondents to sue in Sudan. It was submitted that the court ought to consider the following matters in determining the proper forum:

(a) the guarantee that is the subject matter of this action was issued in Malaysia by the 2nd defendant, a Malaysian
F company;

(b) the demand on the guarantee was made in Malaysia;

(c) the guarantee money sought to be restrained is within
G Malaysia;

(d) the 2nd defendant's witness(es) are in Malaysia and most of the plaintiffs' witnesses are in Malaysia;

(e) the plaintiffs' witnesses do not want to go to Sudan to give
H evidence due to security and/or safety reasons;

(f) Sudan went through civil wars in recent years with loss of about 2 million civilian lives and is described by UN as being unable to protect the life and property of its citizens;

I

(g) the guarantee money by its nature can be dissipated or transferred very quickly, and in Sudan there is no equivalent of our RHC 1980, O. 29 procedure for preservation of *status*

quo in urgent cases. To require the plaintiffs to go to Sudan courts would cause injustice in that the very subject matter would become academic there:

Sudanese courts require all documents to be filed and used must be translated into Arabic language. As the project documents in this case are in English, such requirement of translation would involve much time and costs and also loss of accuracy. When the 1st defendant made a demand on 8 April 2010, the 2nd defendant was about to make payment within several days. There was simply not enough time to go to Sudan to file any injunction cause there, as translation would take much longer time and booking a flight to go there would take about one week, by which time the guarantee money would already be released and any injunction suit would have become academic;

(h) although the applicable law of contract is the Sudanese law, the Sudanese law of contract is not very different from Malaysian law of contract, and the Sharia principle applicable to Sudan are very much similar to Syariah principles applicable in Malaysia and also similar to equitable principles applied by the Malaysian Civil Courts. The Malaysian Civil Courts also handle civil cases involving Syariah principles, including banking cases on Syariah loans and facilities. From the Sudanese lawyers' legal opinion, the Sudanese law applicable to this action is clear, and can be readily applied by Malaysian Court in this action.

[30] The learned Judicial Commissioner decided that in the interests of all parties and for the ends of justice this action should be tried in Malaysia. We agree with His Lordship. The facts show that although the instructions to make the demand originated from the appellant, the purported fraudulent and/or unconscionable demand was made in Malaysia at the 2nd defendant's office in Malaysia. Both the respondents are in Malaysia. Accordingly we are of the view that the evidence from witnesses on the issues of fact would be more readily available in Malaysia thereby making a trial in Malaysia more convenient.

[31] We are unable to agree with the appellant that the 2nd defendant ought not to be made a party in this action. We agree with the learned Judicial Commissioner that the declaratory

orders sought against the 2nd defendant would affect the rights of the appellant. In the circumstances we agree with the learned Judicial Commissioner that the 2nd defendant is a necessary and proper party to this action. Further the 2nd defendant had entered unconditional appearance and had not sought to strike out the respondents' claim.

Civil Appeal No. W-02(IM)-2196-2010 (Enclosure 43)

[32] The learned Judicial Commissioner had dismissed the appellant's application to set aside or alternatively to discontinue the *ad interim* injunction granted against the appellant pending the *inter partes* hearing on the ground that, at that stage, he was satisfied that there were serious questions for trial and a more mature consideration could be done at the *inter partes* stage.

***Ad Interim* Injunction**

[33] It is trite that the court has jurisdiction whether or not to grant an *ad interim* injunction to preserve the *status quo* pending the *inter partes* hearing (*RIH Services (M) Sdn Bhd v. Tanjung Tuan Hotel Sdn Bhd* [2002] 3 CLJ 83). In *Focal Asia Sdn Bhd & Anor v. Raja Noraini Raja Datuk Nong Chik & Anor* [2009] 1 LNS 913, the plaintiffs applied for an injunction under s. 11(1) of the Arbitration Act 2005 which empowers the High Court to make any order for securing an amount in dispute before or during arbitral proceedings as an *interim* measure. The sum in dispute was in part secured by an unconditional bank guarantee for the sum of RM10 million procured by the 2nd plaintiff in favour of the 1st defendant. Mohamad Ariff JC said:

> A demand guarantee or performance bond which is as subject to the well-established principle of autonomy of the document which must be kept separate from the underlying contract. The rule on payment upon a call is strict, subject only to the clear fraud exception, as discussed above. The bank has to pay if the call on the document is not fraudulent or is not based on a forged document. As between the immediate parties, namely the principal and the beneficiary, however, the law allows an extended exception to the autonomy principle. If there is clear evidence of fraud in the underlying contract, or unconscionability, the court can interfere. In these two situations, the integrity and autonomy of the document will not be compromised, since the paying bank will not be directly prevented from acting on the document. It is the beneficiary that is prevented from making a call on the document

> on these grounds. Nonetheless, the evidence allowing intervention by the court must be clear. I accept the test of "seriously arguable that the only realistic inference is fraud" as good law in an interlocutory application …

His Lordship cited the Singapore Court of Appeal case of *Bocoltra Construction Pte Ltd & Ors v. Attorney General* (No 2) [1995] 2 SLR 733 which accepted the legal position that the court will grant an interlocutory injunction restraining a beneficiary from calling on the bond on the ground of fraud or unconscionability. The court said that fraud or unconscionability is the sole consideration for the court in deciding whether an interlocutory injunction should be granted to restrain a beneficiary from calling on the bond. The court need not expend energy to consider where the balance of convenience lies or whether damages will be an adequate remedy.

[34] In *Kejuruteraan Bintai Kindenko Sdn Bhd v. Nam Fatt Construction Sdn Bhd & Anor* [2011] 7 CLJ 442, the Court of Appeal agreed with *Focal Asia* that the principle recognizing unconscionability as a separate and distinct ground to restrain a beneficiary from making a call on a performance bond accorded with good commercial sense as the principle underlying the unconscionability doctrine is the prevention of oppression and unfair conduct. The Court of Appeal held *inter alia*:

> A distinction must be drawn between an injunction to restrain a bank/issuer from making payment out on a performance bond (which is governed by the performance guarantee agreement) and an injunction to restrain a beneficiary from making a demand on the bond (which is governed by the underlying contract between the parties).

The Federal Court agreed with the Court of Appeal in *Sumatec Engineering And Construction Sdn Bhd v. Malaysian Refining Company Sdn Bhd* [2012] 3 CLJ 401 and held that unconscionability may now be raised as a distinct ground to restrain a beneficiary under a bank guarantee or performance bond.

[35] In the present case the facts placed before the learned Judicial Commissioner at the *ex parte* stage were that the appellant had made calls on the guarantee despite parties being in negotiations for settlement and despite the fact that the JV had acceded to the appellant's request by asking for the guarantee to be renewed pending settlement negotiations. The respondents averred that the demand was made as a tool or means of

A oppression or vexation against the respondents and that in the circumstances of this case, a demand or claim of the appellant towards the guarantee would be fraudulent, unconscionable and/or invalid under the law. Based on the facts before the learned Judicial Commissioner, we are unable to find that His
B Lordship had erred in exercising his discretion not to set aside the *ad interim* injunction pending the hearing *inter parte*.

[36] For the reasons adumbrated above we dismissed both appeals with costs to the respondents.

C

D

E

F

G

H

I